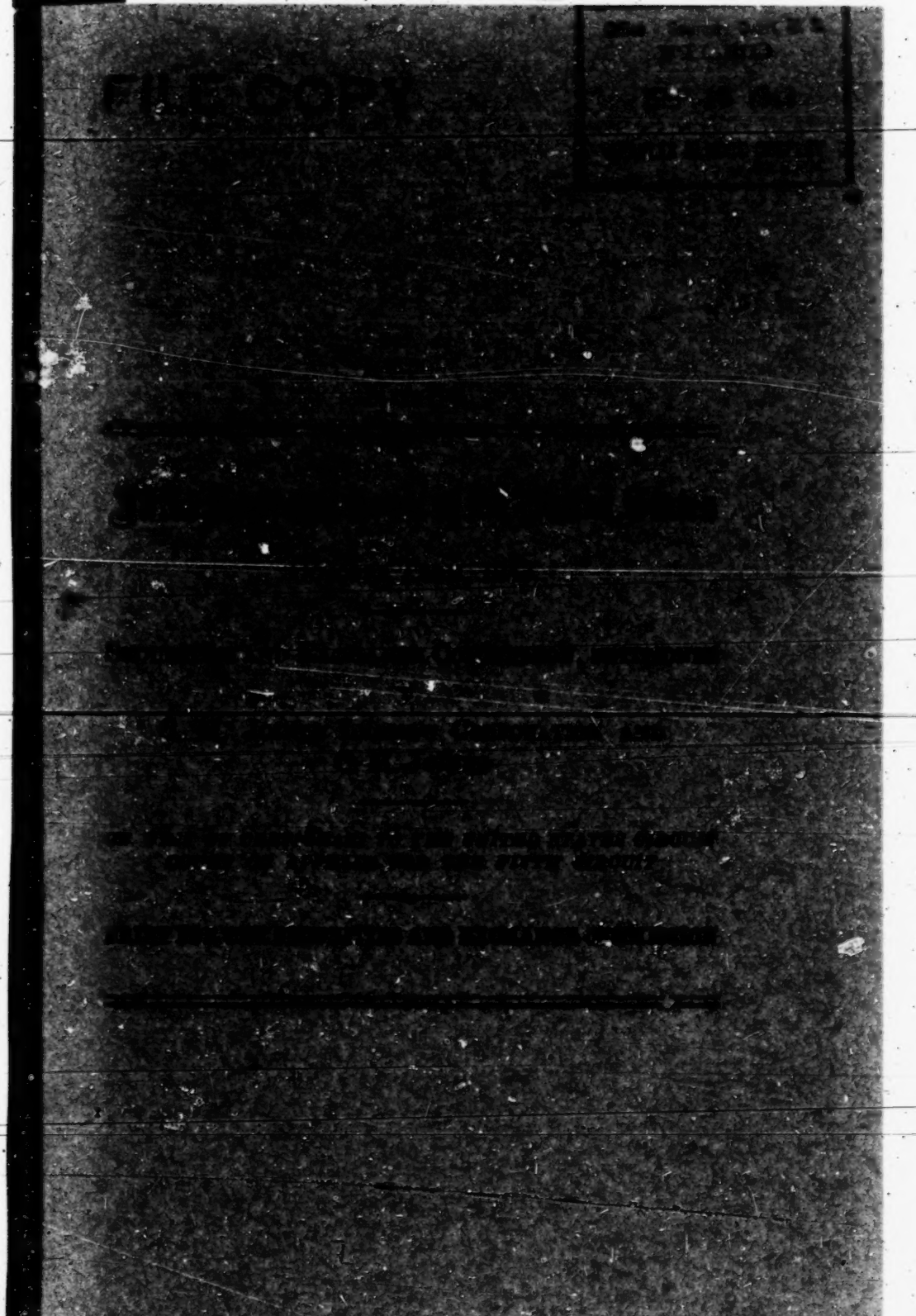

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 24

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

C. M. JOINER LEASING CORPORATION AND C. M. JOINER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinions of the circuit court of appeals (R. 195–202) are reported in 133 F. (2d) 241. The oral opinion of the district court (R. 116a–118a) is unreported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 1, 1943. (R. 202). The petition for a writ of certiorari was filed March 11, 1943, and was granted April 19, 1943. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C., § 77v (a)).

QUESTION PRESENTED

The question presented is whether, under the undisputed findings of fact, the sale of certain oil and gas leases involved the sale of a "security" within the meaning of Section 2 (1) of the Securities Act of 1933.

STATUTE INVOLVED

Section 2 (1) of the Securities Act of 1933 (15 U. S. C., § 77b (1)) provides as follows:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

STATEMENT

This action was instituted by the Commission in the District Court for the Northern District of Texas to enjoin [1] C. M. Joiner Leasing Corporation and C. M. Joiner individually from selling unregistered securities in violation of Section 5 (a) of the Securities Act of 1933 [2] and from violating the anti-fraud provisions of Section 17 (a) (2) and (3) [3] (R. 2a–9a). The facts, which are not in dispute, are as follows:

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[1] The Commission is authorized to bring injunctive actions by Section 20 (b) of the Act (15 U. S. C., § 77t (b)).

[2] Section 5 (a) (15 U. S. C., § 77e (a)) provides as follows:

"Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

[3] Section 17 (a) (15 U. S. C., § 77q (a)) provides in part as follows:

"It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

* * * * *

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

The respondent C. M. Joiner Leasing Corporation, a privately owned company of which the respondent C. M. Joiner is president and directing head (R. 74a), acquired by assignment oil and gas leaseholds in a 3,000-acre tract in McCulloch County, Texas (R. 25a, 75a). This tract was given the name Joiner Paramount Development (R. 40a–44a, 123a), and Joiner made arrangements with a contractor to drill a well (R. 25a–28a, 75a–76a).[1] Thereupon, representing that a well was being drilled (R. 82a, 167a, 170a), Joiner embarked upon a sales campaign in which he offered to sell to the public instruments purporting to be assignments of leaseholds in specific portions of the tract (R. 56a, 62a, 145a–147a, 163a–165a).[2]

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[1] The contractor ultimately drilled 1,375 feet without striking oil and then abandoned his efforts (R. 30a).

[2] The offering was made initially through the medium of one John T. Johnson, who was named as a codefendant in this action. A consent decree was entered on March 16, 1942, permanently enjoining him from violating Sections 5 (a) and 17 (a) (2) and (3) of the Securities Act. (R. 19a–22a).

[3] The form of assignment was as follows (R. 62a, 165a):

"KNOW ALL MEN BY THESE PRESENTS, That, I JNO. T. JOHNSON, operating as Miller Leasing Co. for and in consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, have this day assigned, transferred, conveyed and sold unto MISS SUSIE A. CONWAY, all of my right, title and interest in and to the foregoing oil and gas lease as described and set out in the assignment on the reverse side

The selling literature indicated that investors would earn a profit through the efforts of Joiner in drilling a well on the tract and bringing in oil (R. 33a, 40a–44a, 56a, 82a, 124a–127a, 141a, 168a, 175a). The proceeds were to be used, in part at least, to finance the drilling of the well (R. 76a). Offers were made to 1,500 or 1,800 people in widely scattered areas throughout the country, and actual purchases were made by individuals located in at least 18 states and the District of Columbia (R. 45a, 84a, 176a–179a). The portions of the tract on which leaseholds were assigned covered as little as 2½ or 5 acres and never more than 20 acres, and the price ranged from $5 to $15 an acre (R. 63a, 73a, 83a–84a, 96a, 176a–177a).

The offering was begun without a disclosure of the location of the Joiner Paramount Development, and even after its location was made public the purchasers had no choice concerning the location of their individual leases. They were invited to purchase leases on undescribed and unlocated acreage which was selected in each case by the promoters (R. 40a–44a, 63a, 85a, 97a, 127a).

The district court, while finding that the selling literature was fraudulent and misleading (R. 116a–118a), denied an injunction on the ground

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of this sheet, and the assignee herein hereby accepts same and assumes the payment of the rentals as stipulated therein.

"Dated at DALLAS, TEXAS, this 22nd day of APRIL, A. D. 1941."

that the transactions involved did not constitute sales of a "security" within the meaning of Section 2 (1) of the Securities Act. The court below, while holding that the evidence would justify even "stronger findings of fraud" (R. 198–199, 133 F. (2d) at 244), affirmed the judgment. Judge Hutcheson dissented.

SPECIFICATIONS OF ERROR

The court below erred in:

1. Holding that the sale of oil and gas leases here involved did not constitute the sale of a "security" in the nature of an "investment contract" within the meaning of Section 2 (1) of the Securities Act of 1933;

2. Affirming the judgment of the district court.

SUMMARY OF ARGUMENT

The Securities Act defines a "security" to include any "investment contract." The latter term has been uniformly construed by the courts, both federal and state, to contemplate any scheme whereby money is invested in a common enterprise with the expectation of earning a profit through the efforts of some person other than the investor. Under this approach the courts have found an "investment contract" in the case of a large number of schemes for the purported "sale" or "lease" of some form of real or personal property under an arrangement whereby the seller retains possession and control of the subject of the

"sale" or "lease" with a view to earning a profit for the nominal owners or lessees.

Measured by these tests, the transactions here in question clearly involve the sale of a "security." The nominal leaseholders have not merely purchased leasehold interests in specific pieces of real property. Rather, they have made a speculative investment in a common enterprise from which they hope to secure a profit entirely through the efforts of respondent Joiner in bringing in a successful well and thus increasing the value of all of the surrounding acreage. The mere fact that real property was involved does not take the transaction out of the category of a "security" transaction.

ARGUMENT

RESPONDENTS' SALES OF OIL AND GAS LEASES CONSTITUTE SALES OF SECURITIES WITHIN THE MEANING OF SECTION 2 (1) OF THE ACT

The issue in this case is narrow: whether as a matter of law the respondents have sold merely interests in land or whether they have sold interests in a business enterprise to persons who were led to expect that they would profit through efforts of the seller. If the latter, respondents have sold securities within the meaning of the Act.

The Securities Act is designed to protect the investing public against those who deal with other people's money. This purpose is accomplished by the requirement that the seller honestly disclose

the material facts bearing on the value of securities offered through the mails or in interstate commerce. Dissemination of information is achieved through a "registration statement" filed with the Commission, and a "prospectus" summarizing the information contained in the registration statement. Section 5 (a) of the Act (15 U. S. C., § 77e (a)) forbids the sale of unregistered securities, while Section 17 (a) (15 U. S. C., § 77q (a)) prohibits fraudulent sales of securities.

In Section 2 (1) of the Act (*supra*, p. 2), Congress, following the pattern set by many state "blue sky" laws, did not restrict its definition of the term "security" to such orthodox forms as stocks, bonds, debentures, or notes. Rather it brought within the definition any "investment contract," a term which appears in thirty of the state acts[7] and which has been recognized by the

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[7] See H. Rep. No. 85, 73d Cong., 1st sess. (1933), p. 11.

[8] 8 Ala. Code (1940) tit. 53, § 1; 1 Ark. Dig. Stat. (Pope, 1937) § 861; 1 Cal. Gen. Laws (Deering, 1937) Act 3814, § 2; 4 Colo. Stat. Ann. (Michie, 1935) c. 148, §§ 2 and 19; Conn. Gen. Stat. (Supp. 1935) §§ 4532c and 1548c; Fla. Stat. (1941) § 517.02; 2 Ill. Stat. Ann. (Jones, 1934) § 13.02; 6 Ind. Stat. Ann. (Burns, Supp. 1943) § 25-831; Iowa Code (1939) § 8581.03; Kan. Gen. Stat. Ann. (Corrick, 1935) § 17-1223; Ky. Rev. Stat. (Baldwin, 1942) § 292.010; 1 La. Gen. Stat. (Dart, Supp. 1942) § 1179.1; 3 Mass. Ann. Laws (Lawyers Co-op., Supp. 1942) c. 110A, § 2; 14 Mich. Stat. Ann. (Henderson, 1935) § 19.742; 1 Minn. Stat. (1941) § 80.01; Miss. Code (Supp. 1938) § 792; 2 Mo. Rev. Stat. (1939) § 8258; 2 Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 4027; N. H. Pub. Laws (1926) c. 284, § 2, as am'd, L. 1937, c. 165; N. C. Code (Michie, 1939) § 3924 (b); 6 Ohio Gen.

courts as affording the investing public a full measure of protection, whether the transaction takes one of the more orthodox forms of a security or whether instead the promoter clothes the transaction with the appearance of a sale of some species of real or personal property.

In drawing the line between investment contracts and actual transactions in tangible property, the courts, while hesitant to adopt rigid definitions which would furnish a blueprint for fraud,[9] have looked through form to substance to determine whether in the circumstances of each particular case a "security" is involved. *S. E. C.* v. *Crude Oil Corporation of America*, 93 F. (2d) 844, 846 (C. C. A. 7); *S. E. C.* v. *Universal Service Association*, 106 F. (2d) 232, 237 (C. C. A. 7), certiorari denied, 308 U. S. 622.[10] From these cases

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Code Ann. (Page, Supp. 1942) § 8624-2; Okla. Stat. Ann. (1938) tit. 71, § 1; 5 Ore. Comp. Laws Ann. (Bankroft-Whitney, Supp. 1942) § 80-102; Pa. Stat. Ann. (Purdon, Supp. 1942) tit. 70, § 32; 4 S. C. Civ. Code (1942) § 8114; 3 S. D. Code (1939) § 55.1902; 2 Tex. Rev. Civ. Stat. Ann. (Vernon, 1925) art. 600a, § 2 (a); Utah Rev. Stat. Ann. (1933) § 82-1-4; W. Va. Code Ann. (1937) § 3273 (2); Wis. Stat. (1941) § 189.02. These statutes are collected in 132 CCH Stocks and Bonds Law Service.

[9] See *State* v. *Whitaker*, 118 Ore. 656, 661, 247 Pac. 1077, 1079.

[10] See also *S. E. C.* v. *Wickham*, 12 F. Supp. 245, 247 (D. Minn.); *S. E. C.* v. *Tung Corporation of America*, 32 F. Supp. 371, 374 (N. D. Ill.); *S. E. C.* v. *Payne*, 35 F. Supp. 873, 877 (S. D. N. Y.); *S. E. C.* v. *Bailey*, 41 F. Supp. 647, 650 (S. D. Fla.); *United States* v. *Monjar*, 47 F. Supp. 421, 426 (D. Del.), appeal pending; *People* v. *White*, 124 Cal. App. 548, 555, 12 P. (2d) 1078, 1081; *Prohaska* v. *Hemmer-Miller*

may be derived the general tests and the identification of essential elements of an investment contract.

In *State* v. *Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N. W. 937, 938, decided in 1920, the term "investment contract" was defined by the Supreme Court of Minnesota as a contract providing for "The placing of capital or laying out of money in a way intended to secure income or profit from its employment." Substantially this definition—"the investment of money with the expectation of profit through the efforts of other persons"—has now become crystallized in the cases.[11] The same concept has been ex-

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Development Co., 256 Ill. App. 331; *Kerst* v. *Nelson*, 171 Minn. 191, 195, 213 N. W. 904, 905; *Klatt* v. *Guaranteed Bond Co.*, 213 Wis. 12, 21, 250 N. W. 825, 829.

[11] The Circuit Court of Appeals for the Seventh Circuit has said of this general phrase: "Such definition has support in state decisions and describes a relationship which is in substance that of a security investor." *S. E. C.* v. *Universal Service Association*, 106 F. (2d) 232, 237, certiorari denied, 308 U. S. 622. See also *Atherton* v. *United States*, 128 F. (2d) 463, 465 (C. C. A. 9); *S. E. C.* v. *Wickham*, 12 F. Supp. 245, 248 (D. Minn.); *S. E. C.* v. *Timetrust, Inc.*, 28 F. Supp. 34, 39 (N. D. Cal.); *S. E. C.* v. *Pyne*, 33 F. Supp. 988 (D. Mass.); *S. E. C.* v. *Payne*, 35 F. Supp. 873, 878 (S. D. N. Y.); *S. E. C.* v. *Bailey*, 41 F. Supp. 647, 650 (S. D. Fla.); *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70, 72–73 (W. D. Ky.); *Domestic & Foreign Petroleum Co.* v. *Long*, 4 Cal. (2d) 547, 555–556, 51 P. (2d) 73, 76; *Prohaska* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331; *Lewis* v. *Creasey Corp.*, 198 Ky. 409, 413–414, 248 S. W. 1046, 1048; *State* v. *Heath*, 199 N. C. 135, 139, 153 S. E. 855, 857; Note, 36 Col. L. Rev. 683.

pressed somewhat differently: An investment contract is held to be involved in "all schemes for investment, regardless of the forms of procedure employed, which are designed to lead investors into enterprises where the earnings and profits of business or speculative ventures must come through the management, control, and operations of others and which, regardless of form, have the characteristics of operations by corporations, trusts or similar business structures." *Moore* v. *Stella,* 52 Cal. App. (2d) 766, 778, 127 P. (2d) 300, 306.[12]

[12] In that case, whose facts are strikingly similar to those in the case at bar, the court stated (52 Cal. App. (2d) at 783, 127 P. (2d) at 308):

"By devious means defendants sought to accomplish the same purposes that would have been accomplished in a lawful and legitimate manner by the authorized sale of stock of a corporation holding title to the mineral rights and engaged in developing them with the proceeds of stock sold to investors and for the benefit of stockholders. * * *"

Similarly, in *S. E. C.* v. *Bailey,* 41 F. Supp. 647, 650 (S. D. Fla.), in which the investment contract took the form of a purported sale of land with a concurrent contract for the planting and development of tung trees by the vendor, the court stated:

"Instead of a stock certificate evidencing a share in a common ownership of capital assets, these purchasers receive a deed evidencing an ownership in severalty."

See also *Kerst* v. *Nelson,* 171 Minn. 191, 194, 213 N. W. 904, 905 (purported sale of land under a contract providing for its cultivation as a vineyard by a third party); *S. E. C.* v. *Payne,* 35 F. Supp. 873, 879 (S. D. N. Y.) (purported sale of live silver foxes under a contract providing for their breeding and sale by a third party).

In short, whenever an interest in what is in substance a business enterprise is offered to persons who are led to expect that they will earn a profit through the efforts of the seller or some person other than themselves, it is immaterial whether their shares in the enterprise take the form of stock or bond ownership, or of nominal interests in the physical assets employed in the enterprise. When those conditions are present, the substance controls the form, and a sale of a "security" in the nature of an "investment contract" occurs. Under this approach, a large variety of schemes purporting to involve a "sale" or "lease" of some form of tangible property, and comprehending an arrangement by which the seller retains possession and control of the subject of the "sale" or "lease" with a view to earning a profit for the nominal owners or lessees, has been held to involve a sale of a security.[13]

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[13] Under the Securities Act of 1933 the term "investment contract" has been held to cover purported sales of:

Instruments denominated "bill of sale and delivery contract for — barrels of crude oil": *S. E. C.* v. *Crude Oil Corporation of America*, 93 F. (2d) 844 (C. C. A. 7).

Land for the development of tung trees: *S. E. C.* v. *Tung Corporation of America*, 32 F. Supp. 371 (N. D. Ill.); *S. E. C.* v. *Bailey*, 41 F. Supp. 647 (S. D. Fla.).

Silver foxes: *S. E. C.* v. *Payne*, 35 F. Supp. 873 (S. D. N. Y.). (A registration statement has been filed under the Securities Act covering investment contracts for the sale of live chinchillas.)

Conditional bills of sale for oyster half-shells to be planted on oyster bottom acreage: *S. E. C.* v. *Cultivated Oyster Farms Corp.*, unreported, 1 S. E. C. Jud. Dec. 672, CCH

Conversely, no sale of an "investment contract" occurs when neither the element of a common enterprise nor the element of reliance on the efforts of another is present. Thus, no "investment contract" is involved where a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the

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Fed. Sec. Law Serv., par. 90,121 (S. D. Fla., No. 350, March 22, 1939).

Undivided interests in specified fishing boats: *S. E. C.* v. *Pyne*, 33 F. Supp. 988 (D. Mass.).

Cf. *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70 (W. D. Ky.) (whiskey bottling contracts sold to holders of whiskey warehouse receipts and alleged by the respondent to involve merely the purchase of whiskey).

Under state blue sky laws the term "investment contract" has similarly been held to include purported sales of:

Muskrats: *State* v. *Robbins*, 185 Minn. 202, 240 N. W. 456.

Rabbits: *Stevens* v. *Liberty Packing Corp.*, 111 N. J. Eq. 61, 161 Atl. 193; cf. *Commonwealth* v. *Sofield*, 38 Dauphin County Rep. (Pa.) 233 ("certificate in or under a profit-sharing or participation agreement").

Land to be cultivated as a vineyard by a third party: *Kerst* v. *Nelson*, 171 Minn. 191, 213 N. W. 904.

Land to be developed by the vendee as a fig orchard: *State* v. *Agey*, 171 N. C. 831, 88 S. E. 726. (The North Carolina Blue Sky Law did not include the term "investment contract," but the defendant was held to be an "investment company" within the meaning of the statute.)

Farm land to be paid for with the proceeds of crops planted by the vendor: *Prohaska* v. *Hemmer-Miller Development Co.*, 256 Ill. App. 331.

Option contracts for the sale of land: *State* v. *Evans*, 154 Minn. 95, 191 N. W. 425; *Verellini* v. *U. S. L. Realty Co.*, 158 Minn. 72, 196 N. W. 672; *Webster* v. *U. S. L. Realty Co.*, 170 Minn. 360, 212 N. W. 806.

neighborhood, so long as he does not do so as part of an enterprise whereby it is understood expressly or impliedly that the property will be developed or operated by others. See *In re McCormick's Estate*, 284 Ill. App. 543, 1 N. E. (2d) 769. Again, in *People* v. *Steele*, 2 Cal. App. (2d) 370, 36 P. (2d) 40, the court held that an "investment contract" was not involved where the defendant leased placer mining equipment to a person who was to operate it himself under the supervision of a technical director to be furnished by the defendant."[14]

The transactions in this case fall well within the limits of the tests thus enunciated. The circumstances readily establish that the purchasers here have not merely acquired leasehold interests in specific parcels of realty, but rather have made a speculative investment in a common enterprise from which they hoped to secure a profit through the activities of respondent Joiner.

Following a well-recognized pattern in the sale of oil and gas leases to the public, Joiner first found an area in which there was little indication

[14] See also *Lewis* v. *Creasey Corp.*, 198 Ky. 409, 248 S. W. 1046, where the sale by a wholesale grocery company of so-called "service contracts" to retail dealers was held not to involve a "security contract"; and *State* v. *Heath*, 199 N. C. 135, 153 S. E. 855, where a contract under which the purchaser was to receive 80% of the gross receipts of his own servicing of the vendor's copyrighted realty transfer system was held not to be an "investment contract" because "the anticipated profits were dependent chiefly upon the efforts" of the purchaser.

of oil (R. 105a–108a), so that it might be obtained cheaply, but which was sufficiently close to oil country to provide the basis for materials in advertising circulars. Then, after organizing the respondent company, in whose name he obtained a lease on 3,000 acres, and subdividing his lease into small units, Joiner caused to be sent to over 1,500 individuals throughout the United States, from Maine to California and from Wisconsin to Louisiana (R. 45a, 84a, 176a–179a), high-pressure literature promising that he was going to help his "many friends" (R. 40a–44a, 125a) get rich:

> Approximately $500,000,000.00 has been realized by investors in the OIL FIELDS opened by C. M. "Dad" JOINER (R. 40a–44a, 125a.)
>
> REMEMBER—nothing pays off so quickly, or profitable, like owning acreage near a successfully completed wildcat well (R. 40a–44a, 125a).
>
> * * * we know of no investment of greater promise than an investment in an oil lease around a drilling well in the State of Texas (R. 82a, 172a).[15]

Heavily emphasized was the fact that this was an "investment" and that those who purchased

[15] Former investors who had sustained losses in the past in similar ventures were told:

"If you have sustained any losses in your investments in leases this looks like a good chance for you to make a winning." (R. 82a, 168a.)

would be investors in "one of Mr. Joiner's greatest achievements" (R. 56a, 141a). There was no indication in the selling literature that the purchasers of leases would earn any return on their investments otherwise than through the efforts of Joiner.[16]

This factor in the literature of sole dependence upon the efforts of Joiner and his agents was carried into practice. Joiner, not the purchasers,

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[16] Thus, the selling literature stated:

"We sincerely hope that this will reward you handsomely with a nice profit on your investment, because we believe that this well is destined to be one of Mr. Joiner's greatest achievements." (R. 56a, 141a.)

"This is certainly my supreme effort in attempting to reward you and others, by again bringing in another great oil field, and believe this endeavor is most approbately [*sic*] named my PARAMOUNT DEVELOPMENT. * * * You get the benefit of the experience and judgment of C. M. "Dad" Joiner, the greatest 'wildcatter' the world has ever known. * * * You know that Mr. Joiner has your interest at heart and that his greatest ambition is to again duplicate his East Texas Discovery, thereby rewarding his many friends who have kept faith with him." (R. 40a–44a, 125a.)

"We know that we are oil-minded and optimistic but we believe that we are submitting this proposition to you in language that will appeal only to business people who are interested in making an investment where they have a good chance for splendid returns on the investment." (R. 82a, 168a.)

"We feel that you should sent [*sic*] your order in for as much as you can without its distressing you financially, for as a speculative investment we know of none more promising. Remember, if YOU do not make money on your investment it will be impossible for us to make money. * * * Fortunes made in oil go to those who invest. We believe you should invest here, and now!" (R. 82a, 175a.)

selected the drilling contractor and arranged the terms of the drilling contract (R. 25a–28a, 75a–76a). The contractor, not the purchasers, selected the drilling site (R. 27a). The purchasers did not even select their own leasehold locations; these locations were chosen for them by Joiner or his associate, Johnson (R. 40a–44a, 63a, 85a, 97a, 127a). The relationship of the investors, actual and prospective, to the enterprise was confined to the receipt of constant reminders that Joiner's test well was being drilled and that success was just around the corner (R. 59a, 61a, 82a, 159a, 161a, 167a, 170a). As Judge Hutcheson stated in his dissenting opinion below (R. 201), "The exhibits are the conventional development letters spread with molasses to catch flies, the molasses being the understanding, implied in most of the cases and expressed in some of them, that an exploratory well would be drilled."

Other factors here present reenforce the conclusion that the purchasers have not bought realty for their own use, but rather have made an investment in a common enterprise the value of which depended on the efforts of the promoter. Many of the investors live at great distances from the site of the property of which they are the nominal lessees (R. 45a, 84a, 176a–179a). Geographical remoteness, coupled with the comparatively small size of the individual purchase, negates the notion that this is simply a real

estate transaction.[17] Further, the size of the financial stake of the individual purchasers of "leases" in the Joiner Paramount Development is significant. The largest single investment shown by the record was $100 and the great majority amounted to $25 or less (R. 83a–84a, 176a–177a). These figures contrast with the average estimated cost of drilling an oil well in West Central Texas, where McCulloch County is located, which in 1939 was about $10,000, and with a national average of approximately $21,600.[18] This

[17] The courts have emphasized the fact that East Texas crude oil was sold to residents of Wisconsin (*S. E. C.* v. *Crude Oil Corporation of America*, 93 F. (2d) 844, 848 (C. C. A. 7)); that silver foxes in Wisconsin were sold to residents of New York, Washington, Baltimore, and Chicago (*S. E. C.* v. *Payne*, 35 F. Supp. 873, 878 (S. D. N. Y.)); that interests in Florida tung groves were sold mainly to residents of other states (*S. E. C.* v. *Bailey*, 41 F. Supp. 647, 649 (S. D. Fla.)); and that mineral deeds of land in Oklahoma and Texas were sold to residents of California (*People* v. *Jackson*, 24 Cal. App. (2d) 182, 193, 74 P. (2d) 1085, 1091). In the last of these cases the court stated:

"* * * Bearing in mind, however, that all the grantees named in such deeds were residents of San Diego County, whereas the lands were located in Oklahoma and Texas, and observing also the very small fractional interests conveyed, we have no hesitancy in declaring that the quoted language [giving the right of ingress and egress to drill and develop the land] consists of empty words and that it was never anticipated that the grantees would ever avail themselves of the right so generously accorded to them."

[18] Miller and Shea, *Recent Progress in Petroleum Development and Production*, Hearing before Special Subcommittee on Petroleum Investigations of Committee on Interstate and Foreign Commerce on H. Res. 290 and H. R. 7372, 76th Cong., 3d sess. (1939), part 1, p. 319, at p. 350, table 10.

indicates that the investors had no intention of independently developing their holdings. And, finally, Texas imposes spacing regulation under which a special exception would have to be obtained from the Texas Railroad Commission in order to drill a well on a tract as small as 5 acres.[19]

These factors, together with other physical and economic considerations limiting the number of profitable wells in so barren an area as McCulloch County (R. 106a–107a), establish that the small acreage covered by the leases makes individual exploitation impracticable.[20]

Respondent Joiner's test well was to cost $5,000 plus expenses of casing and tubing (R. 29a, 119a).

[19] Rule 37 of the Texas Railroad Commission (as amended February 18, 1943), the general spacing rule in Texas, requires 20-acre spacing, and many of the special rules adopted by that Commission for particular oil fields likewise require 20-acre or even 40-acre spacing. See statement of M. G. Cheney, Hearings, *supra*, note 18, part 4, at 1778; Walker, *The Problem of the Small Tract Under Spacing Regulations* (Aug. 11, 1938) 37 Oil and Gas J. 41, 101 *et seq.* Since the oil title in this case was severed with a view to oil development, it is at least doubtful whether an exception to Rule 37 would be granted. See *Nash* v. *Shell Petroleum Corp.*, 120 S. W. (2d) 522, 524 (Tex. Civ. App.). In any event the investor would have to sustain the burden, at a hearing before the Railroad Commission, of proving the necessity of a separate well to prevent waste or confiscation of property. See *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 69, 131 S. W. (2d) 73, 89. And litigation might well be involved. *Cf.* the discussion of Rule 37 in *Burford* v. *Sun Oil Co.*, Nos. 495–496, last term, decided May 24, 1943. Furthermore, future development will be subject to the federal wartime spacing regulations issued by the Petroleum Administration for War. See Order 11, effective March 31, 1943, 8 Fed. Reg. 3955, which requires 40-acre spacing.

[20] In *Atherton* v. *United States*, 128 F. (2d) 463, 465 (C. C. A. 9), where the minimum lots covered 2½ acres each,

In short, all the circumstances compel the conclusion that the entire scheme involves in substance a speculative investment in a common enterprise in which there was necessarily contemplated complete reliance by the investor upon respondents' efforts. Consequently, under the established tests discussed above, respondents have been selling securities within the meaning of Section 2 (1) of the Act.

This conclusion is not altered, as respondents have contended, by the fact that the underlying property here is land and that the purchasers' interests are estates in realty.[21] Whatever significance this fact may have in the fields of taxation and conveyancing, it is immaterial in respect of the issue whether an investment contract is

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the court concluded that "The small leased acreage acquired by the individual purchaser was not itself susceptible of economic development, nor was the purchase made with the idea of independent exploitation." And in *Moore* v. *Stella*, 52 Cal. App. (2d) 766, 775, 127 P. (2d) 309, 304 the court stated: "Of course each owner of a drill site would have the right to drill a well on it or to lease it separately for the drilling of a well (assuming that he also held the necessary surface rights); *but the scheme of the promotion cannot be given a pattern drawn on this fantastic possibility.*" [Italics supplied.]

[21] Under Texas law, a lessor's interest in a Texas oil and gas lease is a real property estate which can be the subject of a fee simple title. *Downman* v. *Texas*, 231 U. S. 353; *Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579. In California and other jurisdictions, oil rights are regarded as in the nature of a license. See Marshall and Meyers, *Legal Planning of Petroleum Production*, 41 Yale L. J. 33, 40–43.

here involved. Plainly, a transaction may involve an investment contract even though the property which is the subject of the transaction is realty, as was true in a number of the investment contract cases cited above. See note 13, *supra*. Indeed, this is explicitly recognized both by the Texas Securities Act, which defines a security, *inter alia*, as "any * * * certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title," [22] and by the Securities Act of 1933, which includes in its definition of a security any "fractional undivided interest in oil, gas, or other mineral rights." [23] An instrument conveying realty interests is not

[22] 2 Tex. Rev. Civ. Stat. Ann. (Vernon, 1925), art. 600a, § 2 (a); see *Kadane* v. *Clark*, 135 Tex. 496, 143 S. W. (2d) 197.

[23] The court below was mistaken in its view (R. 199) that the inclusion in Section 2 (1) of the phrase "fractional undivided interest in oil, gas, or other mineral rights" excludes from the definition of "security" sales or assignments of mineral rights in specific tracts. Originally the Act did not include this phrase at all, but Congress nevertheless was of the view that its definition "is broad enough to include as securities, for example, certificates of interest in oil, gas, or mining leases or royalties." H. Rept. No. 85, 73d Cong., 1st sess. (1933), p. 11. The "fractional undivided interest" phrase was added by amendment in 1934 "to make clear, what is already a matter of interpretation, that * * * fractional oil royalty, or leasehold interests and interests of a similar character are included within the definition of a security and thus subject to the Securities Act." H. Rep. No. 1838, 73d Cong., 2d sess. (1934), p. 39. Plainly, Congress thus intended only to identify specifically one of the more frequent forms of investment contracts, and did not intend to narrow the original definition.

by that fact alone removed from the category of a security. *State* v. *Pullen*, 58 R. I. 294, 192 Atl. 473; *Atwood* v. *State*, 135 Tex. Cr. 543, 121 S. W. (2d) 353.[24]

As a matter of administrative construction the Commission has held that an investment contract was involved under facts identical with those in the present case. *Natural Resources Corporation*, 8 S. E. C. 635. Moreover, the only two courts which have considered cases under the Act involving facts substantially similar to those in the case at bar have reached the same result. *Atherton* v. *United States*, 128 F. (2d) 463

[24] The lower court pointed out the availability of the mail fraud statute to stop the type of fraudulent practice in which the respondents were found to have been engaged (R. 199, 133 F. (2d) at 245). The emphasis in the Securities Act, however, is on prevention rather than punishment. Not only may fraudulent activities be enjoined under Section 17 (a), in contrast to the purely criminal operation of the mail fraud statute, but the registration and prospectus provisions of Section 5 also require a certain minimum disclosure to be made in selling securities, and the present action is to enjoin violations of both sections. The very enactment of the Securities Act, therefore, indicates a Congressional belief that the purely penal provisions of the mail fraud statute were inadequate in the securities field. *Cf. Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 550. Even in substance, moreover, Section 17 (a) does more than simply duplicate the mail fraud statute. Cf. *Edwards* v. *United States*, 312 U. S. 473, 483–484.

(C. C. A. 9);[25] *United States ex rel. S. E. C.* v. *Shoemaker* (E. D. Okla., Cr. No. 23443, Nov. 9, 1942).[26]

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[25] According to the statement of facts in the *Atherton* opinion, the basis of the indictment was that "the defendants conceived and carried into effect a scheme to defraud through the sale of partial assignments of oil and gas leases and undivided interests in a drill site" (128 F. (2d) at 463). The indictment in that case discloses that the defendants sold two distinct types of securities: (1) investment contracts involving leases on specific tracts as in the present case, and (2) fractional undivided 1/1000th interests in the 160-acre drill site. We rely here on the holding that the first of these was a security. It is immaterial, moreover, that in the *Atherton* case there was a specific proposal that the entire acreage would eventually be sold as one unit and that each leaseholder would receive a proportionate share of the purchase price. This was not essential to the court's decision. All that was essential was that the purported sales of leases were coupled with an understanding that the promoter would drill an exploratory well. In this respect both cases are alike. The precise arrangements for realizing on the well (if successful) and getting the profits into the hands of the investors are matters of detail, which are not essential elements of an investment contract and which may take a variety of forms.

[26] This is an unreported criminal contempt case. In the third conclusion of law the court held that "defendant's sales of assignments of oil and gas leases involved the sale of * * * 'investment contracts' * * * and therefore constitute the sale of a 'security' as defined by Section 2 (1) of the Securities Act." Copies of the court's findings and conclusions were filed with the clerk along with the petition for certiorari in the present case.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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